



June 22, 2017

By FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (Mail Code 2822T)
Washington, DC 20460
(202) 566-1677

**Re: Freedom of Information Act Request for EPA FOIA Guidelines or Policies
Effectuated Since January 20, 2017**

Dear National Freedom of Information Officer:

Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency ("EPA" or the "Agency"), 40 C.F.R. Part 2. The focus of this request is records regarding policies or guidelines governing EPA's processing and disposition of FOIA requests created, stored, or received since January 20, 2017.

Earthjustice requests a fee waiver for this FOIA request.

RECORDS REQUESTED

For purposes of this request, the term "records" means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

Specifically, we seek:

- 1) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, to any FOIA Officer, FOIA Coordinator, FOIA Specialist, or other EPA personnel designated with handling FOIA requests at EPA in any capacity, in any program or regional office within EPA, concerning any policies, procedures, guidelines, protocols, directives or other instructions on the processing of FOIA requests received by the Agency and any policies, procedures, guidelines, protocols, directives or other instructions on the disposition of FOIA requests received by the Agency (including but not limited to records regarding the release of records or claims of exemption);
- 2) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any

communication, written or verbal, involving the designated Chief FOIA Officer at EPA, concerning the handling, processing, or disposition of FOIA requests; and

- 3) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, between any representative of the National FOIA Program and any FOIA Officer, FOIA Coordinator, FOIA Specialist, the Chief FOIA Officer, or any other EPA personnel designated with handling FOIA requests at EPA in any capacity, concerning the handling, processing, or disposition of FOIA requests.

RECORD DELIVERY

To the extent practicable, Earthjustice requests electronic copies of the above documents. We are seeking full disclosure of all information in the requested records. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> ("DOJ FOIA Memo"). If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) the existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)–(3), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

A. The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a “Direct and Clear” Connection to Operations or Activities of the Federal Government.

The first factor for a fee waiver requires that the subject of the request “concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). The instant request meets this test insofar as the records sought relate to EPA’s performing of its obligations under federal law to provide information to the public. It is recognized that FOIA “reflects our nation’s fundamental commitment to open government.” *See* DOJ FOIA Memo. The requested records pertain to EPA’s activities as it pertains to this fundamental commitment. Therefore, the requested records have a direct and clear connection to operations and activities of the federal government.

Factor 2: Disclosure of the Requested Records is “Likely to Contribute” to Public Understanding of Government Operations or Activities.

The next factor EPA considers is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already... in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, the records being sought will provide Earthjustice and the general public meaningful information about government operations and activities because such disclosure will

increase understanding of EPA's policies regarding the processing of FOIA requests under the new Administration. Since January 20, the number of FOIA requests has surged¹, but the public has been stymied in gaining access to records under FOIA.² Experts expect that this will continue.³ Coupled with the Administration's documented removal of "a wide variety of information that until recently was provided to the public" and the White House's overarching "less-is-more public disclosure practices,"⁴ public understanding of any new policies or procedures regarding FOIA takes on added importance.⁵ Disclosure of the requested records will allow the public to better understand how EPA intends to make records available, thereby enabling requesters to file requests in a manner consistent with Agency policy so as to increase accessibility to these documents.

This information is not already available through EPA's website or otherwise in the public domain.

Factor 3: Disclosure of the Requested Records Will Contribute to "Public Understanding" of EPA's FOIA Process.

EPA next considers whether disclosure will contribute to "public understanding" of the subject. *Id.* § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should "contribute to the understanding of a reasonably broad audience of persons interested in" the subject matter of the FOIA request, as opposed to the "individual understanding" of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has "expertise in the subject area and ability and intention to effectively convey information to the public." *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an "ability to understand and disseminate the information." *Judicial Watch, Inc. v. Dep't of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Here, widespread interest in the government's handling of FOIA

¹ See Meredith Somers, *Surge in Information Requests, Hiring Freeze Puts Pressure on Overburdened FOIA Offices*, Fed. News Radio, Jan. 30, 2017, <https://federalnewsradio.com/management/2017/01/surge-information-requests-hiring-freeze-puts-pressure-overburdened-foia-offices/>.

² See, e.g., Delcianna J. Winders, *Freedom of Information in Peril: What Transparency Looks Like in Trump's Government*, Salon, May 14, 2017, <http://www.salon.com/2017/05/14/freedom-of-information-in-peril-what-transparency-looks-like-in-trumps-government/>; see also Michael Morisy, *Under Trump's First 100 Days, FOIA a Little Slower While Open Data Takes a Hit*, MuckRock, Apr. 28, 2017, <https://www.muckrock.com/news/archives/2017/apr/28/under-trumps-first-100-days-foia-little-slower-why/>.

³ Benjamin Mullin, *Report: Access to Government Information Will Probably Worsen in the Trump Administration*, Poynter, Mar. 13, 2017, <http://www.poynter.org/2017/report-access-to-government-information-will-probably-worsen-in-the-trump-administration/452133/>; see also Kevin Bogardus, *Sessions Stalled FOIA Reform – What Would He Do as AG?*, Greenwire, Dec. 22, 2016, <https://www.eenews.net/stories/1060047596>.

⁴ Glenn Thrush, *Spicer Argues That More Public Disclosure Is Unnecessary, Even Harmful*, N.Y. Times, Apr. 17, 2017, <https://www.nytimes.com/2017/04/17/us/politics/spicer-argues-that-more-public-disclosure-is-unnecessary-even-harmful.html?r=1>; see also Andy Wright & Justin Florence, *Opinion, How Can Congress Overcome White House Obstruction?*, Newsweek, June 7, 2017, <http://www.newsweek.com/how-can-congress-overcome-white-house-obstruction-621745>.

⁵ Juliet Eilperin, *Under Trump, Inconvenient Data is Being Sidelined*, Wash. Post, May 14, 2017, https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html?tid=ss_tw&utm_term=.709cdd6042eb; see also Emily Atkin, *Scientists Feared Federal Data Might Disappear Under Trump. They Were Right.*, New Republic, <https://newrepublic.com/minutes/142704/scientists-feared-federal-data-might-disappear-trump-right> ("The disappearance of federal government information is unprecedented" since "so much information has been made public and accessible online in the last decade.").

requests is demonstrated by the fact that dozens of lawsuits have already been filed by various public interest groups against governmental agencies alleging violations of FOIA.⁶ Earthjustice's expertise in advocating for the public interest through engagement with governmental agencies and its track record of conveying this expertise to the public, not to mention its own experience representing litigants in lawsuits against governmental agencies regarding FOIA requests, weigh in favor of granting of a fee waiver.

Disclosure of the requested records will allow the public to assess and understand how EPA will process requests going forward. Given the documented spike in FOIA requests submitted since January 20th, the concomitant strain on federal agencies, and the number of lawsuits challenging agencies' actions under FOIA, greater understanding of the government's handling of FOIA requests is a matter of great public interest. By clarifying procedures for the public and minimizing the time spent processing requests, this information will reduce the burden on requesters seeking government records and on federal agencies charged with releasing those records. Moreover, disclosure is likely to reduce the number of disputes over FOIA requests and thereby reduce the burden on federal agencies by limiting the number of FOIA requests that ultimately result in litigation.

Earthjustice will draw on its institutional expertise to increase public understanding of issues related to the environment and to the public health, as well as the operations of the federal government related to those issues. Earthjustice intends to make publicly available any significant information released pursuant to this request through our website, which averages approximately 28,000 page views a day, social media outlets, which reach over 500,000 followers, quarterly newsletter, which has a circulation of approximately 100,000 individuals, and/or electronic mailings, which are distributed to a list of over 2 million recipients. Earthjustice will also leverage its position as the nation's leading public interest environmental organization to gain earned media coverage in newspapers, radio, and television for any newsworthy information obtained as a result of this request.

For these reasons, Earthjustice is well-situated to contribute to public understanding of the subject area, and therefore satisfies this factor in its request for a fee waiver.

Factor 4: Disclosure of the Requested Records Will Make a "Significant" Contribution to the Public's Understanding of EPA's FOIA Process.

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the

⁶ At least a dozen lawsuits have been filed regarding FOIAs seeking records related to the environment and public health alone. *See, e.g.,* Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. Animal and Plant Health Inspection Serv.*, No. 17-1153 (D.D.C. filed June 13, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-1044 (D.D.C. filed June 1, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-4084 (S.D.N.Y. filed May 31, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 17-974 (D.D.C. filed May 23, 2017); Complaint, *Am. Oversight v. U.S. Dep't of Interior*, No. 17-958 (D.D.C. filed May 22, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-3519 (S.D.N.Y. filed May 11, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-816 (D.D.C. filed May 3, 2017); Complaint, *Pub. Emps. for Envtl. Responsibility v. U.S. EPA*, No. 17-652 (D.D.C. filed Apr. 13, 2017).

public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information . . . will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor because at present the public has almost no knowledge about how EPA handles FOIA requests in the new Administration. Because the requested information is not available to the public, release of the requested information will contribute significantly to the understanding of a broad public audience of persons interested in this subject. Further, the subject of the request concerns the operations and activities of the federal government, which the public has a right to know about. Observers have noted changes to the timing as well as the content of responses to FOIA requests since the presidential transition,⁷ and EPA's practices have led to several lawsuits regarding its handling of FOIA requests.⁸ As such, disclosure of the requested records will make a "significant" contribution to public understanding in this regulatory area.

B. There is no Commercial Interest in Disclosure of the Requested Records

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Earthjustice, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.⁹ *Id.* § 2.107(l)(3)(i). Indeed, Earthjustice's sole interest in obtaining the requested information is to broaden public understanding of EPA's FOIA policies, guidelines and directives regarding the processing of FOIA requests. Earthjustice has no commercial interest in these records, and neither Earthjustice nor any other party will benefit from the disclosure of these records to Earthjustice. Earthjustice does not charge for its legal services nor does it have any financial stake in the litigation it undertakes.

* * *

For the foregoing reasons, Earthjustice is entitled to a fee waiver for this request. In the event that fees are not waived, please notify and inform us of the basis for your decision, as required by FOIA.

⁷ See Winders, *supra* note 2; Morisy, *supra* note 2.

⁸ See, e.g., Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-1044 (D.D.C. filed June 1, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-4084 (S.D.N.Y. filed May 31, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 17-974 (D.D.C. filed May 23, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-3519 (S.D.N.Y. filed May 11, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-816 (D.D.C. filed May 3, 2017); Complaint, *Pub. Emps. for Envtl. Responsibility v. U.S. EPA*, No. 17-652 (D.D.C. filed Apr. 13, 2017).

⁹ Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. See *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

CONCLUSION

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must... indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, either through the FOIA Online system, or via mail/email at the contact information below:

Alok Disa
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
E: adisa@earthjustice.org.

If you find that this request is unclear or if the responsive records are voluminous please contact me at (212) 845-7386 to discuss the proper scope of this request.

Thank you in advance for your assistance with this matter.

Sincerely,

/s/Alok Disa
Alok Disa
EARTHJUSTICE